

REMARKS

Claims 1-26 were pending prior to this amendment. Claims 1-26 stand rejected. Claims 1-26 have been amended. New claims 27-28 have been added. At least in light of the above amendments and the foregoing remarks, reconsideration and allowance of the claims is respectfully requested.

Claim Rejections – 35 U.S.C. § 112

Claims 1-26 have been rejected under 35 U.S.C. § 112, second paragraph, on the basis of being indefinite for failing to particularly point out and distinctly claim the subject matter of the claimed invention.

Claims 1-26 have been made to address each of the 35 U.S.C. § 112 rejections.

Claim Rejections – 35 U.S.C. § 103

Claims 1, 2, 4-14, 16-21 and 23-26 have been rejected under 35 U.S.C. § 103(a) on the basis of being unpatentable over U.S. Patent Application Publication No. 2003/0074606 (Boker) in view of U.S. Patent No. 6,578,077 (Rakoshitz).

Applicants wish to “swear behind” the Boker reference. Although the September 10, 2001 effective filing date for §102(e) purposes of Boker predates the effective filing date of the present application (present application filed November 30, 2001), Applicants actually reduced the claimed invention to practice prior to the September 10, 2001 effective filing date of Boker. Attached is a Section 131 Declaration signed by representative inventors of the present application that attests to prior actual reduction to practice of present invention. Accompanying the Declaration is an invention submission form (Exhibit A) that was submitted by the inventors to their employers on January 21, 2001 and which corroborates and otherwise demonstrates the correctness of the declaratory evidence that the working model of the entire claimed invention was built and functioning at least before September 10, 2001. Also accompanying the Declaration is a copy of an email (Exhibit B) that was sent between the inventors on April 2, 2001 and which further corroborates and otherwise demonstrates the correctness of the declaratory evidence that the working model of the entire claimed invention was built and functioning at least before September 10, 2001.

Claims 3, 15 and 22 have been rejected under 35 U.S.C. § 103(a) on the basis of being unpatentable over Boker in view of Rakoshitz, and further in view of Official Notice.

Claims 3, 15 and 22 are dependent and should be allowed for at least the same reason as their respective base claims. Applicant traverses the Official Notice taken in the Office Action regarding the feature of “determining deviation of network transport latency and application test latency and display the deviation.” The fact Boker is directed to conducting load testing and never explicitly or implicitly discloses this feature calls into question whether this feature is capable of instantaneous and unquestionable knowledge. MPEP 2144.03. Moreover, Applicant has reviewed other pertinent references, namely the references cited in the Information Disclosure Statement filed concurrently with this Amendment and Request for Continued Examination, none of which disclose this feature. The fact that these other pertinent references also do not explicitly or implicitly disclose this feature further calls into question whether this feature is capable of instantaneous and unquestionable knowledge. Accordingly, Applicant requests evidentiary support for this feature.

New claims

New claim 27 has been added; see page 37 of the present specification, lines 10-15. New claim 28 has been added; see FIG. 3 and the corresponding description on pages 16-23.

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CONCLUSION

For the foregoing reasons, reconsideration and allowance of all pending claims is requested. The Examiner is encouraged to telephone the undersigned at 503-222-3613 if it appears that an interview would be helpful in advancing the case.

Respectfully submitted,

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